No. 11828

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

SEATTLE STAR, a corporation, and
E. L. SKEEL, Liquidating Trustee,
Appellants,

vs.

JOHN RANDOLPH and
PHILIP W. TAYLOR,
Appellees.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES, FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE JOHN C. BOWEN, *Judge*

BRIEF OF APPELLEES

J. CHARLES DENNIS
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STATEMENT

The petition in this case, in two separate causes of action (R 2-10) was filed by appellees in the District Court September 4, 1947 (R 11) — not for the purpose of securing their old jobs back, because these, with proper seniority rights had already been re-

stored, but wholly and solely for the purpose of enforcing other rights vouchsafed to them by the provisions of the Selective Training and Service Act (Sec. 308 T. 50 App. U.S.C.) *"to specifically require such employer to comply with such provisions."*

The statute, Sec. 308 (c) Title 50 App. U.S.C.A. provides:

> "Any person who is restored to a position in accordance with the provisions of paragraph (* * * (B)) of subdivision (b) shall be considered as having been on furlough or leave of absence during his period of active military service, shall be so restored without loss of seniority, *shall be entitled to participate in insurance or other benefits* offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence *in effect with the employer at the time such person was inducted into such service*, and shall not be discharged from such position without cause within one year after such restoration." (Italics ours.)

Section 308(e) reads:

> "In case any private employer fails or refuses to comply with the provisions of subdivision (b) or *sub-section (c)*, the District Court of the United States for the district in which such private employer maintains a place of business shall have power, upon the filing of a motion, petition or other appropriate pleading by the person entitled to the benefits of such provisions, *to specifically require such employer to comply with such provisions*, and, as an incident thereto, to compensate such person for any loss of wages *or bene-*

fits, suffered by reason of such employer's unlawful action * * *." (Italics ours.)

Thus, the veteran was not only assured of his old job back without loss of seniority, but likewise the Congress assured him that he would "*be entitled to participate* in insurance or other *benefits offered by the employer*," one of which was, of course, severance pay based upon his length of service in accordance with the provisions of the severance pay schedule set out at p. 9 hereof. And, because of his military service, insofar as his job was concerned, he was to be considered "on furlough" during his military service, which has been construed by the courts to mean "in the service of his employer at the plant."

The essential facts were stipulated (R 15) and after full argument the trial court made the following oral decision (R 30-32):

> "THE COURT: This statute of Congress, Title 50, Section 308 Appendix, was a humane measure for the protection of the soldiers and sailors and others in the military service in respect to their employment while they were absent in the military service. The public policy therein expressed must of necessity have a liberal construction. If we admit in this case that there is a conflict between the union contract of employment relating to all employees of the Seattle Star and this statute, it seems to me that the policy of the statute must be upheld to the exclusion of the conflicting provisions of the agreement be-

tween the union, allegedly representing these employees, and the employer, the Seattle Star.

"The conflict between the statute and the work contract would be more explicit if, instead of 'other benefits', the statute in subsection (c) had said 'severance pay'. But the statutory provision that 'returned soldiers shall be entitled to participate in insurance or other benefits offered by the employer' (in effect to the other employees) certainly includes severance pay. It is all-inclusive. And if we fail to apply in favor of these veterans the same statutory treatment as to severance pay which was accorded the other employees, then these returned soldiers — veterans of the second world war — are not participating, as they are entitled to under the statute, in such other benefits including severance pay.

"If it could be said, arguendo, that some doubt is thrown upon the meaning of the statute as applied to the kind of benefit here involved—namely, severance pay benefit — by reason of the fact that that benefit was not mentioned by the statute expressly but was expressly mentioned in the work contract wherein such benefit was excluded by paragraph 5, then such doubt should be by the Court resolved in favor of the veteran, under the rule requiring liberal interpretation of a statute for the relief of veterans.

"However, I do not see how it is possible for these plaintiffs, who are war veterans, to enjoy the other benefits offered by the employer to other employees if the plaintiffs are denied this particular benefit of severance pay secured to them by the statute on a parity with other employees who were continuously on active duty with the employer during the period of time that the plaintiffs were in the war service. It seems clear to the Court that to give effect to the con-

tract provision that time spent by plaintiff veterans on military leave should not be included in the computation of their severance pay would clearly be in conflict with the Act of Congress which provides that these veterans upon return from active service with the military forces shall have the other benefits enjoyed by these employees who did not go into the service.

"For the reasons stated by the Court, the Court finds, concludes and decides in favor of the plaintiffs for the amounts respectively alleged in the complaint."

Based upon this oral decision, findings of fact, conclusions of law and judgment were duly entered on September 19, 1947 (R 32-40) from which this appeal is prosecuted.

In the Court's oral decision, reference, it will be noted, is made to paragraph 5. That paragraph refers to Article VIII of the Union contract in effect October 5, 1940, to October 4, 1942, which is Ex. B. (R. 20-22). Paragraph 5 reads:

"5. By *written agreement* with the Publisher, employees may be granted leaves of absence without prejudice to continuing service in the determination of severance pay, *but time spent on such leave shall not count as service time.*" (R. 22) (Italics ours.)

Of course, there is no contention here by appellants, as we understand it, that there was any written agreement between the Star and these veterans with

respect to the military leave of appellees, and even had there been and it embodied the provisions of this paragraph 5 it would be clearly against public policy in the circumstances, because Congress had already declared the public policy, in the enactment of the Selective Training and Service Act.

Clearly paragraph 1 of Article X — Military Service, Ex. B. (R. 23) insofar as it provides that "such leave may be deducted in computing severance pay" (in effect October 5, 1940 to October 4, 1942) is in direct conflict with the amended Act of September 16, 1940, c. 720, Sec. 8, 54 Stat. 890 (Sec. 308c, Title 50 App. U.S.C.) and apparently was so recognized by the Union and the appellant Seattle Star, because we find in the new contract, Ex. C. (R. 24-28), this provision completely eliminated, and Article X. — Military Service, in effect on and after January 1, 1946, brought into conformity with the provisions of the Selective Training and Service Act.

This change was made, by mutual agreement while appellees were in military service.

ARGUMENT

At the outset we call attention to the two documents in the record labeled "Appellants' Designation

of Points To Be Relied Upon On Appeal" (R. 44 and R. 48).

That set out at R. 44 contains but two points and was timely filed under the rule (Rule 75d) but that set out at R. 48 contains a third point which was never presented to nor considered by the trial court, was never filed with the Clerk of the District Court within the time limited by the Rule or at all, but was filed with the Clerk of this Court long after the time had expired for the filing of the record in this court, and therefore cannot now be considered because of its being first raised on appeal.

Jones v. United States, 179 F. 584.

The statute under which this proceeding was initiated is the veteran's re-employment provisions of the Selective Training and Service Act of 1940 as amended (Title 50 U.S.C.A. App. Sec. 301, et seq.) which, by Section 308(b), provides:

> "In the case of any such person who, in order to perform such training and service, has left or leaves a position, other than a temporary position, in the employ of any employer and who (1) receives such certificate, (2) is still qualified to perform the duties of such position, and (3) makes application for re-employment within ninety days after he is relieved from such training and service or from hospitalization continuing after discharge for a period of not more than one year —
>
> * * *

> "(B) if such position was in the employ of a private employer, such employer shall restore such person to such position or to a position of like seniority, status, and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so; * * *"

With this provision of the law appellant Seattle Star fully complied. In restoring appellees to their former positions it gave appellees the benefit of the Union contract graduated wage increase based entirely upon "years of service" including therein, in its calculation, the time appellees were in actual military service (and not working at the plant). In the case of appellee Randolph it was slightly over four years (January 9, 1942 - January 14, 1946), (R. 16-17), and in the case of appellee Taylor, it was approximately 3½ years (August 20, 1942 - February 5, 1946) (R. 18-19), but appellants refused to recognize this same principle with respect to severance pay when, on August 13, 1947, the Seattle Star sold out, discharged all of its employees, and commenced voluntary liquidation proceedings (R. 16).

After commencing liquidation proceedings wherein appellant Skeel was named the Liquidating Trustee, and in paying off the discharged employees of the Star insofar as veterans were concerned, appellants refused to include the time these veterans served in the military service in computing severance pay, but

did pay non-veterans severance pay (R. 19) in accordance with the severance pay schedule, which follows (R-24):

ARTICLE VIII SEVERANCE

* * *

2. Upon dismissal, any employee covered by this contract shall receive a cash severance pay in a lump sum in accordance with the following schedule:

Six months and less than one year..... 2 weeks
One year and less than two years..... 3 weeks
Two years and less than two and one-half years ..... 4 weeks
Two and one-half years and less than three years ..... 5 weeks
Three years and less than three and one-half years ..... 6 weeks
Three and one-half and less than four years ..... 7 weeks
Four years and less than four and one-half years ..... 8 weeks
Four and one-half and less than five years ..... 9 weeks
Five years and less than five and one-half years .....10 weeks
Five and one-half and less than six years .....11 weeks
Six years and less than six and one-half years .....12 weeks
Six and one-half years and less than seven years .....13 weeks
Seven years and less than seven and one-half years .....14 weeks
Seven and one-half years and less than eight years .....15 weeks
Eight years and less than eight and one-

half years .....16 weeks
Eight and one-half years and less than nine years .....17 weeks
Nine years and less than nine and one-half years .....18 weeks
Nine and one-half years and less than ten years .....19 weeks
Ten years and less than ten and one-half years .....20 weeks
Ten and one-half years and less than eleven years .....21 weeks
Eleven years and less than eleven and one-half years .....22 weeks
Eleven and one-half years and less than twelve years .....24 weeks
Twelve years and less than twelve and one-half years .....26 weeks
Twelve and one-half years and over....28 weeks

The rule is well settled that "collective bargaining agreements" which come into conflict with the provisions of the Selective Training and Service Act (subsection c. Sec. 308, Title 50 App. U.S.C.) must yield thereto.

Lord Mfg. Co. v. Nemenz (D.C. Pa. 1946), 65 F. Supp. 711;

Trailmobile Co. v. Whirls (C.C.A. Ohio 1946), 154 F. (2d) 866 (reversed on other grounds, 331 U.S. 40, 91 L.Ed. 939).

The trial court was right in awarding judgment in favor of appellees and it is respectfully submitted that the judgment should be affirmed.

ARGUMENT
IN ANSWER TO APPELLANTS
SUMMARY OF ARGUMENT

The gist of appellants' contention is that because Union contract between appellant Seattle Star and the bargaining agents of its employees (The Seattle Newspaper Guild) provided that (1) *time on leave of absence* should not be included in computing severance pay, (2) that *time spent in the Armed Forces* should likewise not be included in the computation of severance pay, and (3) that appellees lost their preferential position upon the termination of the *first year* of their re-employment, and that as a result, they must be treated no differently from the non-veterans in the computation of severance pay. This third point was not raised below and comes too late.

In its last analysis, the contention plainly is that appellees *merely "took a vacation." They did no such thing.*

The service they so patriotically performed for their country was *anything but* a vacation!

Nor can it be successfully argued that they or either of them were given a "preferential position" upon their return. The fact is that the "stay-at-homes" are the ones who were given a preference, and

the veteran by reason of this preference to the "stay-at-home" was grossly discriminated against, contrary to law.

We will deal with appellants' argument in the order presented in the brief.

First, it is argued that under Title 50 App, U. S. C. Sec. 308, the rights of each claimant to employment benefits were determined by the contract in effect between the Seattle Star and the Seattle Newspaper Guild at the time that appellees were inducted into the armed forces.

Of course this is not wholly true, because the statute is not predicated upon, nor did the Congress intend that a Union contract should fix the rights of persons called into the military service in time of war under the Selective Training and Service Act (T. 50 App. U.S.C. Sec. 301 et seq.) any more than the Government would have been required to secure the permission of the Union before Congress could make a declaration of war.

The premise is true only in the sense that it was by virtue of the Union contract that the employer adopted the severance-pay schedule, which was "*in effect with the employer at the time*" these appellees "*were inducted into such forces*" (Sec. 308c).

The statute says the veteran "shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to *employees on furlough* or leave of absence * * *." Insofar as the contract undertook to modify the plain provisions of the statute, it is clearly against public policy, and, therefore, void.

The Union contract, in paragraph 5 of Article VIII (R. 22), provides that "*time spent on such leave* shall not count as service time," but an examination of the paragraph should convince anyone that the leave referred to therein is leave *voluntarily granted by the employer* which must be "by written agreement" as distinguished from *involuntary leave* of the employee by virtue of being drafted into the Armed Forces of the United States, in accordance with the statute. To argue that permission of the employer to his employee for leave to enter the military service in the defense of his country must be had under any circumstances is too absurd to merit serious attention.

In apparent realization of the attitude of some employers on this score, the Congress, cognizant of conditions extant after World War I and the plight in which the veterans of that war found themselves after being mustered out, enacted this humane legislation to prevent a recurrence of the shameful spec-

tacle of men who had so valiantly fought for their country, after being mustered out, being required to stand on street corners selling pencils and apples in order to eke out an existence, to assure those entering military service in the Second World War that they would be protected in this regard by their Government.

It is true that in the Union contract in effect prior to the time these appellees left their respective positions with the Star to enter the military service was the unconscionable provision which penalized such employees for entering military service by the tenth Article thereof (R. 23) which authorized a leave of absence "to serve in the Armed Forces of the United States * * * with severance-pay rating and other rights unimpaired *except that such leave may be deducted in computing severance pay.*"

However, before appellees commenced their service in the Army, and in January, 1941, this italicized provision was deleted and the new Article X was substituted and appears in the printed contract bearing date of January 1, 1946 (R. 26.7). For convenience we are setting it out herein. It reads:

> "An employee who is required by the United States or any subsidiary thereof to enter any kind of service, military or otherwise, which takes him out of the employment of the Publisher, or

> who, while the United States is at war, voluntarily enters into any of the military armed services of the United States, or who is released from his job as a result of any government order or ruling, shall be deemed an employee on leave of absence, and shall resume his position or a comparable one within two (2) weeks from date of his notice of desire to resume employment, *with dismissal pay rating and other rights unimpaired.* * * * "

So that, before the appellees left their employ with the Star and before they returned from their military service there was no provision in the Union contract providing that military leave should be deducted in computing severance pay.

The leave of absence provision is paragraph 6 of Article VIII (R. 25).

The language of the statute (Sec. 308c) is:

> "Any person who is restored to a position in accordance with the provisions of * * * (B) of subsection (b) *shall be considered as having been on furlough or leave of absence during his period of military service.*" (Italics ours.)

This is a declaration by the Congress that time spent in the armed forces shall be considered as time in service of the employer, but without pay from the former employer during such time, while paragraph 6 of Art. VIII of the Contract can only have reference to the kind of leave covered by "written agreement with the Publisher."

Appellee Randolph first entered appellant Seattle Star's employ in 1936. He became a reporter two years later. He left that employment in 1942 and served in the Army until 1946. He had worked for the Star nearly six years before answering the call of his country, four years of that as a reporter. When he was re-employed by the Star in 1946 he was classified as a sixth year reporter and was paid a salary of $65 per week (R. 17).

When he was discharged from his employment in August, 1947, he was receiving a weekly salary of $73.50.

In other words, appellants recognized for the purpost of seniority and wages, a *full-time continuous service*, but nevertheless refused to recognize appellees four years' military service as full-time continuous service in computing severance pay.

The same is true as to appellee Taylor.

This same section of the statute provides that the veteran shall be so restored "without loss of seniority, *shall be entitled to participate* in insurance on *other benefits offered by the employers* * * *."

Counsel at p. 7 of their brief say:

> "It is manifest therefore that one can determine the benefits to which a returning veteran

is entitled only by determining the benefits to which he would have been entitled *had he not been inducted into the Armed Forces* but rather had taken a furlough or leave of absence."

This is the crux of the case as made by appellants, and had Congress and the Courts not spoken on the subject there might be some room for argument in the position they take. But the Congress has spoken and the courts — many of them — have construed this statute.

For instance, in the Fishgold case (328 U.S. 275), Mr. Justice Douglas said:

> "This legislation is to be literally construed for the benefit of those who left private life to serve their country in its hour of greatest need. See *Boone v. Lightner*, 319 U.S. 561, 575, 63 S. Ct., 1223, 1231, 87 L.Ed. 1587. *And no practice of employer or agreements between employers and Unions can cut down the service adjustment benefits which Congress has secured to the veteran under the Act.*" (Italics ours.)

In that same case, the Court further said:

> "As we have said, these provisions guarantee the veteran against loss of position or loss of seniority by reason of his absence. He acquires not only the same seniority he had; *his service in the armed services is counted as service in the plant so that he does not lose ground by reason of his absence.*" (Italics ours.)

Fishgold v. Sullivan Drydock & Rep. Corp., 328 U.S. 275.

Counsel for appellants, commencing at page 9, cite, and quote from, Circuit Court cases as well as the Fishgold case, supra, on the question of "furlough and leave of absence" with all of which we agree, but the argument ignores the fact that at the time these appellees entered the military service that the feature of the Military Service provision of the Union contract contained in Article X (R. 23), which provided that military "*leave may be deducted in computing severance pay*" was eliminated therefrom as more fully appears by an examination of the new Article X appearing in the record at pp. 26 and 27.

The new Article X (p. 27) even further provides:

> "To protect an employee granted military leave in the event that such employee by reason of death is unable to resume employment, the Publisher agrees that from January 2, 1944, the Publisher will pay $1.00 per month towards the Government Insurance carried by such employee.
>
> "This payment is sufficient to purchase, at current rates, $1,500.00 Government Life Insurance and the disability provisions incidental thereto." (Ex. C).

There is involved in this case no question of so-called super-seniority, nor is there anything in the Supreme Court's opinion in the case of *Trailmobile Company v. Whirls*, 331 U.S. 40, 91, L.Ed. 939, that militates against the contentions here made.

In a case decided by the Circuit Court of Appeals for the Third Circuit and filed March 16, 1948 — *Joseph A. Mentzel v. Elizabeth Iron Works Company* (not yet in the Advance Sheets) — No. 9537, involving a very similar matter (vacation pay), the Court, speaking through Circuit Judge Gooderich, said:

> "While the veteran was in the Army an association, of which the employer is a member, entered into a contract with the Union which was evidently the bargaining agent for the employee. This contract, of course, binds the employer and there is no suggestion that it does not. The point on which this case turns has to do with the language of Section 4(a) of that contract. It provides: "Employees shall receive vacations of one week with pay after one year's service: vacations of two weeks with pay after five years of service. * * *"
>
> "If Mentzel is entitled to count the period from the beginning of his employment with the Company, including the time he spent in the Army, as "service" he was entitled to two weeks vacation with pay in 1946. If he is not entitled to count the time spent in the Army as "service" with the employer under the terms of this contract, he has received, in his one week's vacation with pay, all that he is entitled to. The latter is the position taken by the learned District Court and upon that basis he gave judgment for the defendant.
>
> "The precise point seems to be new in this Circuit and elsewhere. But we think that the principle on which our own previously decided cases has been rested is sufficient to show what we think should be the answer here. In *Gauweiler*

v. Elastic Stop Nut Corporation, 16 2 F. (2d) 448 (C.C.A. 3, 1947), we examined the decisions of the Supreme Court in *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275 (1946), and *Trailmobile Co. v. Whirls*, 331 U. S. 40 (1947). We concluded that the analysis of the Supreme Court meant "that what the Act gives to the veteran is the right not to lose his position or seniority by virtue of his absence in military or naval service. He is protected, while away, to the same extent as if he had been either continuously on the job in the plant or away on furlough or leave of absence for some personal reason." (p. 451). We held in that case that the veteran took subject to the contract made by the bargaining Union and the Company in his absence which had to do with seniority for Union officials. By the same token, quite clearly, the veteran is entitled to benefits accruing in his absence.

"Again, in *McLaughlin v. Union Switch and Signal Company*, —— F. (2d) —— (C.C.A. 3, February 9, 1948) we said: '* * * we can see no reason why the protection of the Selective Training and Service Act of 1940 in appropriate cases should not embrace vacation rights which the employee has earned and would have received as a matter of course but for his induction. * * * the statute was intended to place veterans on the precise point of the vacation escalator which they would have occupied had they kept their positions continuously during the war * * *.'

"The statements quoted are not dicta, but enunciate the principle back of our decisions in the two cases cited. We thought then, and we think now, that the enunciation of the principle is in accordance with that given by the Supreme Court in the Fishgold and Trailmobile cases.

"The application here is simple. The veteran

is to be treated, so far as benefits under the Act are concerned, as though he had worked every day at the plant. He steps back on the escalator, when discharged from service, at the point where he would have been had he never donned the uniform. That being so, he is entitled to whatever vacation rights would have accrued to him had he not shouldered a gun and gone off to war. In this case, under the contract, it would have been two weeks for 1946. He was paid for one, he is entitled to be paid for the other.

"The judgment of the District Court will be reversed and the case remanded with directions to enter judgment for the plaintiff for the amount sued upon and costs."

On the second point argued by appellants, commencing at page 14 of the brief, stress is laid upon Sections 4 and 5 of Article VIII (R. 22) of the Union contract, saying:

"The quoted sections make clear the fact that severance pay is dependent upon the *total years of full-time continuous employment* and — that time spent on leave of absence is *not* to be counted in the computation of the period of full-time continuous employment."

We can only reiterate what we have already conceived to be the holding of the Supreme Court of the United States in the Fishgold case, supra, wherein the Court said:

"* * * his service in the armed services is counted as service in the plant so that he does not lose ground by reason of his absence."

In any event, the rule is well settled that a Union contract cannot be used to "destroy and whittle down statutory right of returning Servicemen." *Trailmobile Co. et al v. Whirls*, 154 F. (2d) 866.

And a change in a Union contract during period of service of employee in armed service redounds to the benefit of the veteran. *Armstrong v. Tennessee Coal I. & R. Co.*, 73 F. Supp. 329.

It is stated by appellants (Br. p. 16) that the parties to the Newspaper Guild - Seattle Star contract anticipated leaves of absence on the part of employees and that the contract stipulated the exact effect such leaves would have, but the difficulty with the conclusion counsel draw from this fact is that the leaves of absence contemplated thereby are not the leaves of absence or "furlough" contemplated and provided for in the Selective Training and Service Act. The leave of absence provided for in the contract is the kind that is to be arranged by "written agreement" between the employer and employee as distinguished from the "furlough" Congress said the employer must grant to its employees called to the colors.

How counsel for appellants find any comfort in the third Circuit case of *Ganweiler v. Elastic Stop Nut Corporation of America* (1947), 162 F. (2d) 448,

is beyond one's comprehension, first, because it involves only a question of seniority rights with which we are not here concerned and, secondly, because that court, in its opinion, said, concerning the point on which we most strongly rely:

> "It is to be emphasized that in our case *there is no suggestion of discrimination against veteran employees.* The significance of that point was mentioned by the Supreme Court in the Trailmobile case, 67 S.Ct. 982 at page 991. *Discrimination would obviously change the whole picture.*"

And that is precisely the point here. In the instant case appellants were guilty of "*discrimination against the veteran employees* in the matter of severance pay, in that they refused to accord them full severance pay while non-veterans were paid in accordance with the scale in effect at the time of discharge in August, 1947.

Therefore, the trial court was right on this point and its judgment should be affirmed.

On the third point raised in the brief, and which we have heretofore pointed out, was neither raised by the pleadings, called to the attention of the trial court nor argued below, is raised for the first time on this appeal and comes too late.

Jones v. United States (9 Cir.) 179 F. 504;
Marco v. United States (9 Cir.) 26 F. (2d) 315;

United States v. Domres, 142 F. (2d) 477.

Counsel for appellants on this point have built up a straw man on the theory of "super-seniority" and then proceed to knock him down on the one-year theory, based upon the decision of the United States Supreme Court in the Trailmobile case, which has not the slightest applicability here.

In the case at bar there is no question whatever of "super-seniority" but the simple matter of "benefits".

To argue that the veteran restored to his former position upon his discharge from the Army must be "discharged" within one year from the date of his re-employment in order to secure the full benefit of severance pay is, to say the least, a most unusual contention and one which borders on the ridiculous. Severance pay is calculated wholly and solely upon length of service ranging from six months to twelve years (R. 24-25) and, as we have already seen, military service under the Selective Training and Service Act, the United States Supreme Court has held, "*is counted as service in the plant so that he (the veteran) does not lose ground by reason of his absence.*" (328 U.S. 275).

So that, even if the question were properly raised, there is no merit in the contention.

The Act of Congress under which this proceeding was instituted in the District Court contemplates a speedy hearing and its advancement on the calendar. No specific provision is made in the Act for a review of the decision of the District Court.

A speedy hearing was had in the District Court. It has taken just seven months since the entry of the judgment below to get this case here for review. The judgment was entered in September, 1947, which leads us to believe that Congress did not intend to provide for appeals from judgments of this sort except perhaps on constitutional grounds.

So far as here pertinent, the statute (Sec. 308a) reads:

> "* * * The court shall order a speedy hearing in any such case and shall advance it on the calendar."

The petition was filed September 4, 1947 (R. 2). The answer, September 15, 1947 (R. 11). The hearing had the same day and findings of fact, conclusions of law and judgment entered September 19, 1947 (R. 32-38). The notice of appeal was filed December 16, 1947 (R. 41) and the specification filed the same day.

This, we submit, is not the speedy hearing contemplated by Congress and no constitutional question being raised on this appeal it is questionable if there is a right of appeal. We respectfully ask that this court assign this case for early hearing.

CONCLUSION

From the foregoing, the Court must conclude that there is no merit whatever in this appeal and the judgment of the District Court should be affirmed.

Respectfully submitted

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